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Nos. 88-1125 and 88-1309

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JANE HODGSON, *et al.*,
Petitioners,

v.

THE STATE OF MINNESOTA, *et al.*,
Respondents.

STATE OF MINNESOTA, *et al.*,
Cross Petitioners,

v.

JANE HODGSON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE LUTHERAN CHURCH-MISSOURI SYNOD AS AMICUS CURIAE IN SUPPORT OF THE STATE OF MINNESOTA

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QUESTION PRESENTED

Whether the Minnesota statute requiring a 48-hour written notice to parents of an unemancipated minor of their minor's pending abortion, without a judicial by-pass procedure, is constitutionally permissible because it protects the family right of privacy and promotes the integrity of the family.

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INTEREST OF AMICUS CURIAE

The Lutheran Church-Missouri Synod is the second largest Lutheran denomination in North America and the eighth largest Protestant body in the United States.

It is composed of approximately 6,200 member congregations which, in turn, have approximately 2,600,000 individual members. The Lutheran Church-Missouri Synod holds a profound belief that human life begins at conception and opposes willful abortion, except as tragically necessitated to prevent the death of the mother. The Lutheran Church-Missouri Synod believes that parents have the primary duty and right to counsel a pregnant, minor daughter on the issue of an unplanned pregnancy and to provide compassionate alternatives to abortion.

The letters from the parties consenting to the filing of this brief are submitted herewith to the Clerk pursuant to Rule 36.2.

STATEMENT OF THE CASE

The amicus adopts the statement of the case in the Brief for the Cross Petitioners.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case presents to the Court a Minnesota statute regulating the family decision-making process when a minor child chooses to have an abortion. The statute's "pure notice" provision requires a minor's physician or his agent to notify both of the minor's parents 48 hours before her planned abortion, without provision for a judicial bypass procedure. Minn. Stat. § 144.343(2) (1988).

This case is a significant opportunity for the Court to re-examine the constitutional basis for *Bellotti v. Baird*, 443 U.S. 621 (1979) (*Bellotti II*), *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), and other cases which give minors the right to an abortion without the involvement of their parents. The issues in this case require the Court to consider the wisdom of granting minors a right to an abortion without family involvement, a right which directly violates the fundamental right to family privacy. By permitting a minor to have an abortion without parental involvement, the Court is interfering with the right of parents who believe religiously that it is their duty to guide and counsel their children. The Court is further contributing to the decline of the family, the traditional source of the instruction of moral values to American youth.

The Court should uphold the "pure notice" provision of the Minnesota statute based on the fundamental right of family privacy. In so doing, the Court should overturn its holdings in *Danforth*, *Bellotti II*, *Planned Parenthood v. Ashcroft*, 462 U.S. 476 (1983) and *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), to the extent they require state laws regulating minors' abortions to permit a bypass of parental involvement in minors' decisions to have abortions.

ARGUMENT

THE MINNESOTA STATUTE REQUIRING A 48-HOUR NOTICE TO PARENTS OF A MINOR THAT SHE INTENDS TO HAVE AN ABORTION SHOULD BE UPHELD UNDER THE CONSTITUTION. THE PARENTS' RIGHTS TO RAISE A FAMILY AND TO GUIDE THEIR CHILDREN IN ETHICAL AND MORAL DECISIONS SHOULD NOT BE VIOLATED BY COURT HOLDINGS THAT GIVE A MINOR THE RIGHT TO HAVE AN ABORTION.

Supreme Court decisions stating that a minor has a right of privacy entitling her to an abortion free of parental authority contradict the case law precedents for *Roe v. Wade*, 410 U.S. 113 (1973).

1. *Roe v. Wade's* right of privacy analysis depends largely upon *Griswold v. Connecticut*, 381 U.S. 479 (1965), and other family privacy cases.

In 1973, in *Roe v. Wade*, the Supreme Court held that under the United States Constitution a woman has a fundamental right to privacy which may include the right to an abortion. 410 U.S. 113 (1973). The Supreme

Court based its rationale in large part on *Griswold v. Connecticut*, a case involving constitutional protection of the right to family privacy. After searching for a source for the right to an abortion, the *Roe* Court relied on the right of privacy which is "founded in the Fourteenth Amendment's concept of personal liberty and restrictions on state action." *Id.* at 153. The Court found that the sources for the right of privacy under the fourteenth amendment existed both in the penumbras of the Bill of Rights, as held in *Griswold v. Connecticut*, and in the concept of liberty guaranteed by the first section of the fourteenth amendment, as held in *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), discussed below. The Court extended the family privacy right found in these cases to justify a right to an abortion, relying on the concept that the right of personal privacy has "some extension" to activities relating to marriage, procreation, contraception, family relationships, child rearing, and education. *Roe*, 410 U.S. at 152-153. In this manner, the right of privacy, upon which *Roe* and the subsequent minors' abortion rights cases are based, is derived from the family right of privacy established in *Griswold*, *Pierce*, and *Meyer*.

2. The constitutional right of marital privacy in *Griswold* is based upon the right of privacy in raising a family.

In 1965, the Supreme Court held in *Griswold v. Connecticut* that married people have a fundamental right of privacy which protects their use of contraceptives from state interference. 381 U.S. at 485-486. On the basis of this family right to privacy, the *Griswold* Court struck down a Connecticut statute prohibiting the use of contraceptives. *Id.* The Court declared that the statute was unconstitutional, not because it regulated sexual activity, but because the statute interfered directly in the intimate relationship of husband and wife. The Court based its

decision on the concept that the family relationship merits special protection from state interference. The Court stated in *Griswold*:

> We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Id. at 486.

The majority opinion in *Griswold* reveals the Court's intent to reinforce this Nation's continuing esteem for the family. The privacy right in *Griswold* is deliberately based on the right of family privacy. The Court protected the marital relationship as the very core of the family. At the time of *Griswold*, the Court had recognized the right of family privacy as a fundamental right for over forty years. As precedent for its holding, the *Griswold* Court cited the 1923 Supreme Court decision of *Meyer v. Nebraska*, 262 U.S. 390 (1923), and its 1925 decision of *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). *Griswold*, 381 U.S. at 481. The language of the *Griswold* opinion evidences the Court's marked concern for family integrity, legally affirming the family relationship as a noble, lasting institution deserving protection from state interference.

3. The precedents for *Griswold* establish that the foundation of the family privacy right is a fundamental right of parents, not the state, to decide how to raise their children.

Two major precedents for the fundamental privacy right relied upon in *Griswold* are *Meyer* and *Pierce*. In these cases and those following them, discussed below, the Supreme Court has consistently recognized, respected,

and protected family integrity. The constant theme found in these early family privacy cases is that the unique nature of the family entity and its fundamental right of privacy require the Court to insulate the family in a special, private realm from the dictates of the state in decisions affecting child development and rearing.

An examination of these two early cases on the fundamental right to family privacy reveals the stark contrast between the traditional constitutional protection the Court provides the family, and the Court's marked lack of reverence for the family when presented with the issue of the minor's right to an abortion.

In the first of the two major privacy cases cited in the *Griswold* opinion, *Meyer v. Nebraska*, the Court struck down a Nebraska statute which prohibited the teaching of foreign languages to students below the eighth grade level. The Court held that the statute unconstitutionally infringed upon the liberty guaranteed to families under the due process clause of the fourteenth amendment. 262 U.S. at 401-402. The Court based this holding on the family's "natural duty" to educate its children, a duty from which necessarily flows the corresponding constitutional, fundamental right of parents to make decisions and to control the upbringing of their children. *Id.* at 399. The *Meyer* Court found that the inherent value of the family to society elevates family privacy to the level of a fundamental constitutional right. *Id.* at 399-400.

Meyer introduced two major themes into the constitutional family privacy line of cases. First, by emphasizing the family's role in the development of their children as citizens, the Court stated that the inherent value of the family socialization function merits a special measure of protection. *Id.* at 399, 402. The Court's opinion said that families instill the various values that cause children to become individuals, an important quality in American society. *Id.* at 399-400; *see also Moore v. City of East Cleveland*, 431 U.S. 494, 503-504 (1977) ("It is through

the family that we inculcate and pass down many of our most cherished values, moral and cultural."); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."). In *Meyer*, the Court protected the function of the family and criticized governments that remove children from the control of their parents in attempts to produce ideal citizens. *Meyer*, 262 U.S. at 401-402.

The second major theme of *Meyer* is that state control over children conflicts with the "established doctrine" that legislative action may not arbitrarily or unreasonably interfere with man's liberty "to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Id.* at 399. While the Supreme Court recognized the state's power over children, such as the power to compel school attendance, the Court refused to permit a state to use such power when it resulted in interference with family integrity. *Id.* at 402-403.

In the second major family privacy case on which the Court relied in *Griswold*, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the Court re-affirmed the sanctity of the family institution protected in *Meyer* and continued to apply and develop the two themes of *Meyer*. In *Pierce*, the Court first relied on *Meyer* to hold that the state's compulsory education act, requiring every child between the ages of eight and sixteen to attend public schools, unconstitutionally infringed upon and interfered with the liberty of parents "to direct the upbringing and education" of children under their control. *Pierce*, 268 U.S. at 534-535. The Court relied on the two complementary theories asserted in *Meyer*: the family has inherent value

because of the ways in which parents raise and educate their children; and the "fundamental theory of liberty" of the family excludes any general power of the state to "standardize its children." *Id.* at 535.

The *Pierce* Court restated the second theory of *Meyer* as follows: Rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. *Id.* In holding the state's compulsory education act unconstitutional, the Court asserted that decisions relating to child-rearing are not within the competency of the state. As in *Meyer*, the Court respected the fundamental right of the parents to make family decisions affecting their minor children, preferring the parents' interest above the asserted interest of society and the state: "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.* As in *Meyer*, the Court protected the parents' decisions from interfering state legislation based upon the fundamental right to family privacy.

4. In defining the fundamental right of family privacy in non-abortion cases, the Court has shown a consistent respect for American tradition and history, as well as for its own precedents.

The Court has applied the doctrine of family privacy in numerous cases.[1] The discussion in this Section argues that it is settled constitutional law that the parents' au-

[1] *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (plurality opinion); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Armstrong v. Manzo*, 380 U.S. 545 (1965); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *id.* at 495-496 (Goldberg, J., concurring); *id.* at 502-503 (White, J., concurring); *May v. Anderson*, 345 U.S. 528 (1953); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

thority within their households to direct the rearing of their children is primary and is paramount to a state's interest in regulating the relationship between parents and children. The Court has invariably protected the family from state intrusion, in the absence of abuse, neglect, or other danger to the child. As the cases reveal, the Court has consistently adhered to the parents' rights to rear their children in cases that involve issues just as sensitive as abortion and in cases in which the parents' rights arguably conflict with those of the child.

The right to family privacy developed as the Court considered a wide variety of issues involving the relationship of the state to parents and children. In general, the Court has applied the family privacy right to protect all members of the family as a discrete unit from unwarranted state interference. In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court held that the first and fourteenth amendments prevent a state from compelling Amish parents to send their children to public school from eighth grade through age sixteen. In *Yoder*, the Court cited the *Pierce* rule: the functions of a state which relate to children, such as education, must yield to the right of parents to direct the religious upbringing and education of their children. *Id.* at 213.

The *Yoder* Court explained that tradition and precedent require the Court to protect the family's privacy from state interference, as a fundamental right. First, the Court continued to regard the family unit as a discrete entity, emphasizing the traditional esteem in which American society holds the child rearing role of the family. *Id.* at 214. In the opinion of the Court, parental direction of their children's future is a family role which has a "high place in our society." *Id.* The Court believed that the history of Western civilization showed a strong tradition of parental concern for the upbringing of their children, reflected in an enduring American tradition

that parents have the primary role as decision makers in their children's lives. *Id.* at 232.

Second, the Court respected the doctrines of its precedents which established a fundamental, due process right to family privacy. The *Yoder* Court cited *Pierce* for the proposition that the autonomy of the family is a "fundamental" concept which forms the basis of all United States government and which derives from the common law duty of parents to raise their children. *Id.* at 232-233. The Court defined this concept to include the duty and corresponding constitutional right of parents to teach their children moral standards, religious beliefs, and elements of good citizenship. *Id.* at 233. As in other family privacy cases, the Court found that this familial duty deserves constitutional protection from the state and precludes the state from standardizing children.

In *Ginsberg v. State of New York*, 390 U.S. 629 (1968), the Court favored parental rights over those of the child and upheld a statute which forbade merchants to sell obscene materials to minors. The Court held that dual state interests justified such a statute: the interest in the well-being of youth and the interest in reinforcing parental authority. *Id.* at 639-640. The Court determined that "[t]he legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility." *Id.* at 639. In upholding the law, the Court emphasized that the statute did not interfere with the parental role in assessing sex-related materials and did not prevent parents from giving obscene materials to their children if they chose to do so. *Id.* As in *Meyer* and *Pierce*, the Court required state statutes regulating the relationship between parents and children to respect the inviolability of the parental right to control their children. *Id.*

The Court's decisions in family privacy cases do not recognize an absolute right to parental autonomy but rather a strong parental right of liberty to control family life, which is tempered by society's concern for the well-being of children and the need for security within organized society. The Court in *Prince v. Massachusetts*, 321 U.S. 158 (1944), discussed this balance and upheld application of a criminal statute, a child labor law, to prevent the parent of a minor child from allowing the child to distribute religious literature on a city street.

The *Prince* case raised the competing claims of the parents' right to rear children and the state's authority to regulate, as well as the sensitive issue of freedom of religion. *Id.* at 168. The *Prince* Court stated the general constitutional standard that a state may act as parens patriae to restrict parents' control in order to guard the state's general interest in the youth's well-being. *Id.* at 168-171. *Compare Yoder*, 406 U.S. at 230 (the power of parents to make decisions for a minor is subject to limits if it appears the parents' decision will either jeopardize the health and safety of a child or potentially cause significant social harm) *and Stanley v. Illinois*, 405 U.S. 645 (1972) (states may intervene in family decisions and limit parental rights when the child's welfare or safety is endangered or when the public must be protected, if tht state cannot protect the interests adequately without intervention) *with Parham v. J.R.*, 442 U.S. 584, 624 (1979) (Stewart, J., concurring) (state intervention, whenever a parent commits a child, is not warranted because there is a rebuttable presumption that a parent is acting in the best interests of his child and because Georgia law provides that an unfit parent may be stripped of his parental authority under laws dealing with neglect and abuse of children).

5. The Court's holdings that minors have the right to an abortion without parental involvement clash with the accepted doctrines of the family privacy line of cases.

By requiring exclusion of the parents from the moral, social, and religious decision surrounding an unplanned pregnancy, the Court has created law which contradicts *Roe*'s own long-standing precedents establishing the family privacy right. The result of the Court's decisions in the minors' abortion cases is that an individual right of privacy has been held to supersede the very right from which it was derived, the right to raise a family, found in Supreme Court precedents which protect the family from state interference. Ironically, the Court has eviscerated the very precedents upon which it based *Roe*.

This destruction of the force of the family privacy right violates the doctrine that the Court must respect the themes and holdings of its precedents. Important policy considerations support a continuity and predictability in the law. *Boys Markets, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235, 240 (1970). Stare decisis plays an important role in orderly adjudication and serves the broad societal interests in evenhanded, consistent, and predictable application of legal rules. *Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980). Respect for past decisions should not mean a mechanical formula of adherence to the latest decision, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience. *Helvering v. Hallock*, 309 U.S. 106, 119 (1940), *cited in Thomas*, 448 U.S. at 241. Proper respect for the rule of stare decisis calls for a return to the doctrines of family autonomy set forth in *Pierce* and *Meyer* and followed by the Court in *Griswold*, by overruling this Court's holdings that a minor must have the right to circumvent parental involvement in her decision to have an abortion.

The tortuous reasoning in the Supreme Court cases on minors' rights to abortions evidences the Court's inability adequately to reconcile the abortion right with the fundamental rights of family privacy. In *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), the Court ignored the inherent inconsistency in granting minors the right to an abortion without parental consent, in spite of a long line of constitutional cases acknowledging the parents' fundamental right to dictate their child's moral, social, and religious decisions and to affect general development of their children. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). *Danforth* marks the beginning of the erosion of the two long-accepted doctrines of *Meyer* and *Pierce*, that parents control their children's decisions and may do so without state interference. *Danforth* gave pregnant children the constitutional right to make decisions without their parents' involvement and contrary to their parents' wishes, thereby permitting a state to isolate a child from her parents without the state showing any harm to the child from the parents' involvement.

To reach its conclusion that a Missouri statute requiring parental consent for a minor's abortion was unconstitutional, the *Danforth* opinion first states that a wife has a constitutional right to obtain an abortion without spousal consent. Since neither the state nor any third party could veto an adult woman's abortion decision, the Court bootstrapped to finding a minor's right, reasoning that a minor must have a right to an abortion without a veto by her parent. *Danforth*, 428 U.S. at 74. The Court then held the consent statute unconstitutional, omitting any analysis of established precedents that parents have the "high duty" to direct their children in moral, social, and religious decisions. The abortion decision involves precisely the type of value judgments which

the Court traditionally and consistently has held are reserved to the parents in guiding their children. Since *Danforth*, the Court has isolated the pregnant child from the parent in what may be the single most stressful and confusing choice she must make in a lifetime. The *Danforth* decision, therefore, shows a blatant disregard for the family and the earlier family privacy decisions of the Court.

No adequate reason is found in the *Danforth* opinion for requiring the removal of a minor from parental involvement in her pregnancy decision. According to the opinion, the very existence of the minor's pregnancy had so "fractured" the family that it was fruitless for the state to attempt to enhance parental control and authority through a consent requirement. *Id.* at 75. The Court also recognized the "truism" that a minor who has exhibited the ability to become pregnant has exhibited a degree of maturity sufficient to elevate her right to an abortion above her parents' fundamental right to affect her development. *Id.* The Court later repudiated both of these "truths." *See Bellotti II*, 443 U.S. at 648 (the Court assumed that a "normal family relationship" exists when a minor child is pregnant); *H. L. v. Matheson*, 450 U.S. 398, 408 (1981) ("There is no logical relationship between the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion."). The minor's right to an abortion, without parental consent, is not supported by any rationale in the *Danforth* opinion other than the conclusion that an adult woman has the right to decide to abort her pregnancy without her husband's consent.

The Court has continued woodenly to apply the minor's right to an abortion without parental involvement, as decided in *Danforth*, despite its own contrary precedents supporting family-made decisions. The Court has conceded that similar factors are present in the situation of a minor with an unplanned pregnancy as were present

in cases such as *Yoder* and *Pierce*: the particular vulnerability of children, the inability of children to make critical decisions in an informed and mature manner, and the importance of the guiding role of parents in the upbringing of their children. *Bellotti II*, 443 U.S. at 633-39; *see also H. L. v. Matheson*, 450 U.S. 398 (1981) (the state's interest in preventing medical, emotional, and psychological harm are significant when a pregnant girl is a minor). The Court acknowledged that the state validly may limit freedom of minors when making important affirmative choices with potentially serious consequences and that the state may impose parental notice and consent requirements on a minor's right to make important decisions. *Bellotti II*, 443 U.S. at 634, 640.[2] The Court has said that it is constitutionally permissible for a state to require minors to seek parental advice about a pregnancy. *Bellotti II*, 443 U.S. at 634, 640-641; *Akron*, 462 U.S. at 427 n.10.

In the face of these statements of precedent, the Court has ignored the state's interest in protecting parents' rights. The *Bellotti II* Court rationalized that the state must act with "particular sensitivity" when it legislates to foster parental involvement because the decision involves the "unique nature of the abortion decision" and a "constitutional right to seek an abortion." *Bellotti II*, 443 U.S. at 642. While the plurality in *Bellotti II* recog-

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[2] The language of the Court in *Bellotti II* with respect to parental notice and consent is in accord with the general rule that the consent of the parent is necessary for an operation on a child. *Rogers v. Sells*, 61 P.2d 1018 (Okla. 1936); *Zoski v. Gaines*, 260 N.W. 99 (Mich. 1935); *Franklyn v. Peabody*, 228 N.W. 681 (Mich. 1930); *Browning v. Hoffmann*, 111 S.E. 492 (W. Va. 1922); *Moss v. Rishworth*, 222 S.W. 225 (Tex. Crim. App. 1920); *Commonwealth v. Nickerson*, 87 Mass. (5 Allen) 518 (1862); *see also Parham v. J. R.*, 442 U.S. 584, 603 (1979) ("Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments.").

nized that alternatives to abortion may be feasible and relevant to the minor's best interest, the Court concluded that *Danforth* prevented a state from requiring parental consent. *Id.* at 643.

The *Bellotti II* decision is an example of how the Court has blindly applied *Roe* and *Danforth* as precedents on the abortion issue, while ignoring the older fundamental family privacy precedents and the adverse effects of isolating a child from her parents in an important moral, social, and religious decision. The Court intrudes deeply into the family by its decisions in *Danforth* and *Bellotti II*, creating divisiveness and distrust in a most sacred, intimate relationship, and causing the precise type of interference with the family entity that the Court forbade in *Pierce*, *Meyer*, and *Yoder*.

6. The fundamental right of parents to direct the rearing of their children outweighs a minor's right to an abortion as a matter of sound constitutional law.

The irony of the Court's decisions depriving parents of involvement in their children's decisions to have abortions is increased by the realization that the Court apparently does *not* feel that a minor's right to an abortion is a *fundamental* right, yet the Court believes the minor's right must outweigh the parents' right of family privacy, which is fundamental. The Court has not stated that minors have a fundamental right to an abortion. The level of scrutiny the Court applies in the minors' abortion rights cases evidences that the Court does not feel that minors have a fundamental right to abortions.

Generally, legislation that does not interfere with a fundamental right is examined under a "rationally related" test to determine whether the legislation is constitutional. *New Orleans v. Dukes*, 427 U.S. 297 (1976); *San Antonio Ind. School Dist. v. Rodriquez*, 411 U.S. 1 (1973); *Reed v. Reed*, 404 U.S. 71 (1971). However, in

contrast to this lowest standard of scrutiny, state legislation that encroaches upon a fundamental constitutional right is subject to strict scrutiny, the most exacting standard: the regulation may be justified only by a compelling state interest, and the law must be narrowly tailored to express only that legitimate state interest. *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Cantwell v. Connecticut*, 310 U.S. 296 (1940). The state must show that its action is necessary to promote a compelling or overriding state interest. *San Antonio Ind. School Dist.*, 411 U.S. 1 (1973). A third approach, intermediate scrutiny, has been used by the Court when the statute implicates an important, but not fundamental, right. The legislation must bear a substantial relationship to an important state interest when state action affects an individual's significant interest or right. *Craig v. Boren*, 429 U.S. 190 (1976).

In *Danforth* the Court sought a "significant," as opposed to compelling, state interest behind the parental consent requirement of the statute under scrutiny, thereby implying that the right of the minor was not a fundamental right. *Danforth*, 428 U.S. at 75. The Court stated that intermediate scrutiny is the proper standard in the minors' abortion cases in *Carey v. Population Services Intern.*, 431 U.S. 678, 693 (1977). This is a less rigorous test than the "compelling state interest" test applied to restrictions on adults' fundamental privacy rights. *Carey*, 431 U.S. at 693 n.15. According to the Court, the mid-tier standard of scrutiny is appropriate when a state statute regulates minors' abortions, because the state has greater power in the regulation of children; the abortion decision requires independent decision making; and children are regarded by the law as having less capability to make these decisions. *Id.* The Court has found that a state has an "important" interest in en-

couraging a familial, rather than a judicial, resolution of a minor's pregnancy decision. *Bellotti II*, 443 U.S. at 639; *see also Matheson*, 450 U.S. at 411-413 (the state has a "significant" interest in regulating minors' abortions).

A post-*Danforth* decision which did not involve abortion signals that family privacy is still a fundamental right. *Parham v. J. R.*, 442 U.S. 584 (1979), presented to the Court the opportunity to limit the parents' right to make decisions for children and to apply generally the limits on parents the Court imposed in *Danforth*. *Parham* involved the right of parents voluntarily to commit their child to a mental health facility without a state statute imposing a pre-commitment, formalized fact-finding hearing for the child. The family privacy right was held to prevent state intrusion into a family decision because the law's concept of the family "rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions." *Id.* at 602. The Court stated that the risk of abuse

> [C]reates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interest. The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition.

Id. at 602-603 (citation omitted) (emphasis in original).

The Court's analysis in *Parham* demonstrates that the family privacy right is still a fundamental right. The Court should reconcile its continued deference to the family decisional right with the Court's disregard for the family when it is faced with an unplanned pregnancy.

The Court should analyze the parental notice requirement of the Minnesota statute at issue in this case with

proper respect for the traditional, fundamental right to family privacy, balancing against that right the less than fundamental right of the minor to have an abortion without parental involvement.

Upholding the "pure notice" provision of the Minnesota statute supports an important component of the time-tested fundamental right to family privacy—the fundamental right of a parent to influence the child on *all* moral, social, and religious decisions. *Yoder*, 406 U.S. at 232. The abortion decision is a moral, social, and religious decision. When a minor faces an unplanned pregnancy, the parents should have the right to discuss the moral, social, and religious implications of the decision with their daughter. A family with a pregnant minor is still a family; the value of the family unit is as high as before the child's pregnancy; and parents have a deep interest in discussing the pregnancy with their child. If anything, the sensitive nature of an unplanned pregnancy requires increased protection of the parents' important right to counsel their child. A holding that the Minnesota statute's "pure notice" provision is constitutional will serve to strengthen the family unit and the traditional American value of parental authority within it.

The Lutheran Church-Missouri Synod believes parents have a God-given right and responsibility to be the primary shapers of their children's values and morals. Dr. Martin Luther clearly enunciated this principle in *The Large Catechism*, written in 1529. The Lutheran Church-Missouri Synod and virtually all Lutheran churches in the world still regard *The Large Catechism* as an official and binding doctrinal statement.

Lutherans believe that "God has exalted this estate of parents above all others; indeed, He has appointed it to be His representative on earth." Luther, *The Large Catechism*, in *The Book of Concord* 382 (T. Tappert ed.

1959). Parents "occupy the place of God," *id.* at 389, who "has created and ordained them to be our parents." *Id.* at 380. Moreover, God has appointed and commanded obedience to father and mother "next to obedience to His own majesty"; for that reason, "nothing ought to be considered more important than the will and word of our parents, provided that these, too, are subordinated to obedience toward God." *Id.* at 381. "Out of the authority of parents all other authority is derived," including that of schools, households, and civil government. *Id.* at 384ff. With such authority goes the parental responsibility to "earnestly and faithfully discharge the duties of their office, not only to provide for the material support of their children . . . but to bring them up to the praise and honor of God"; this is a "strict commandment and injunction of God, who holds you accountable for it." *Id.* at 388. Accordingly, "we must spare no effort, time, and expense in teaching and educating our children to serve God and mankind," for it is a parent's chief duty, "on pain of losing divine grace, to bring up his children in the fear and knowledge of God." *Id.* at 380.

Because parents are charged with the responsibility of training their children in the moral values of the Christian faith, statutes permitting children to bypass parents in reaching the important moral decision of what to do about an unplanned pregnancy deprive parents of that right and responsibility, thereby directly interfering in the practice of an important religious belief.

Interference by the state in family decisions concerning abortion violates another important religious belief—that abortion itself, except as necessary to save the life of the mother, is contrary to the will of God and, therefore, is not a moral option. The sanctity of human life from conception and opposition to abortion are sincere and deeply held religious beliefs of The Lutheran Church-Missouri Synod. The Synod has, throughout its history, opposed abortion and has adopted official positions in its

conventions since 1971, condemning willful abortion as contrary to the will of God. Its convention resolution, "To State Position on Abortion" adopted in 1979, states that based upon Scripture, "the living but unborn are persons in the sight of God from the time of conception"; that "as persons the unborn stand under the full protection of God's own prohibition against murder"; and that abortion is not a moral option, except as tragically necessitated by medical procedures applied to prevent the death of the mother. *See* 1979 Lutheran Church-Missouri Synod Resolution 3-02A "To State Position on Abortion," Appendix 1a.

Adherence to the prior holdings of this Court that a judicial bypass procedure must be included in parental notice and consent statutes regulating minors' abortions results in undermining the fundamental family right of privacy, a right which includes the parents' right to affect their child's religious, moral, and medical decisions. The judicial bypass inserts the state, through the court system, directly between the parent and child, destroying all hope that parents can talk to the child about her pregnancy and thus exercise their religious beliefs and fundamental right of family privacy.

Such state intervention is not justified, and by requiring it, the Court violates the general standard the Court established in *Prince* and *Yoder*, that the state may intrude on the privacy of a family only to protect a child from harm. The Court should not continue to mandate such a violation of a fundamental right, because of some possibility of an undefined harm to the minor when the parents learn of the pregnancy. If the Court requires the Minnesota "pure notice" statute to include a judicial bypass provision, the Court will contradict the traditional assumption that parents act in their child's best interests and that each family is a healthy, well-functioning family. *Parham*, 442 U.S. at 604. The Court should not ignore such a time-honored American belief.

The Court should hold the "pure notice" section of the Minnesota statute constitutional, based upon the fundamental right of privacy of the family which, on balance, is paramount to any non-fundamental right of a minor to have an abortion. In doing so, the Court should overturn its earlier holdings in *Danforth*, *Bellotti II*, *Akron*, *Ashcroft*, and *Matheson*, requiring state laws to have judicial bypass procedures as alternatives to parental involvement in minors' abortion decisions.

CONCLUSION

The Lutheran Church-Missouri Synod believes that this Court should end its participation in the current trend toward erosion of the parents' authority over their children and disintegration of the traditional American family. It asks this Court to reverse the United States Court of Appeals for the Eighth Circuit by upholding the constitutionality of the Minnesota statute requiring prior notice to a minor child's parents of her intention to have an abortion, without requiring the statute to include a judicial bypass procedure.

Respectfully submitted,

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APPENDIX

TO STATE POSITION ON ABORTION

RESOLUTION 3-02A

Overtures 3-20A-3-23 (*CW*, pp. 97-99)

WHEREAS, The Lutheran Church-Missouri Synod throughout its history has opposed abortion and since 1971 has spoken in convention to condemn "willful abortion as contrary to the will of God"; and

WHEREAS, We as members of Christian congregations have the obligation to protest this heinous crime against the will of God legally sanctioned in the United States and other lands; and

WHEREAS, The practice of abortion, its promotion, and legal acceptance are destructive of the moral consciousness and character of the people of any nation; therefore be it

Resolved, That The Lutheran Church-Missouri Synod in convention urgently call upon Christians—

1. To hold firmly to the clear Biblical truths that (a) the living but unborn are persons in the sight of God from the time of conception (Job 10:9-11; Ps. 51:5; 139:13-17; Jer. 1:5; Luke 1:41-44); (b) as persons the unborn stand under the full protection of God's own prohibition against murder (Gen. 9:6; Ex. 20:13; Num. 35:33; Acts 7:19; I John 3:15); and (c) since abortion takes a human life, abortion is not a moral option, except as a tragically unavoidable byproduct of medical procedures necessary to prevent the death of another human being, viz., the mother; and

2. To speak and act as responsible citizens on behalf of the living but unborn in the civic and political arena to secure for these defenseless persons due protection under the law; and

3. To offer as an alternative to abortion supportive understanding, compassion, and help to the expectant parent(s)—and family, and to foster concern for unwanted babies, encouraging Lutheran agencies and families to open hearts and homes to their need for life in a family; and be it further

Resolved, That the Synod earnestly encourage its pastors, teachers, officers, and boards—

1. To warn publicly and privately (Prov. 31:8-9) against the sin of abortion;

2. To instruct the community of God that abortion is not in the realm of Christian liberty, private choice, personal opinion, or political preference;

3. To nurture a deep reverence and gratitude for God's gracious gift of human life;

4. To oppose in a responsible way attitudes and policies in congregations, schools, hospitals, Lutheran social service agencies, and other institutions within their sphere of influence and work which suggest that abortion is a matter of personal choice;

5. To support the efforts of responsible pro-life groups in their communities, e.g., "Lutherans for Life" (CTCR Report, *CW*, p. 74);

6. To promote clear instruction of Christian morality in homes, schools, and churches of the Synod, showing the blessings and safeguards inherent in God's will for sexual chastity before marriage and faithfulness in marriage;

7. To teach within our Lutheran schools and churches the biological, social, and parental functions of childbearing; and

8. To support the efforts to secure the human life amendment to the United States Constitution.